IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 75

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

APPELLANT'S PETITION FOR REHEARING.

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Appellee.

APPELLANT'S PETITION FOR REHEARING.

International Harvester Company, Appellant in the above appeal, respectfully petitions for a rehearing.

The Court states in the last paragraph of its opinion that:

> "there is nothing about application of the formula in this case that indicates a potentially unfair result under any circumstances. It is not even contended here that the amount of these taxes could be considered to bear an unjust or improper relation to the value of the privilege of doing business in Ohio if the legislature had imposed a flat franchise tax of the same amounts for the respective years which application of this formula has produced."

Apparently this observation was intended to apply both to the question under the due process clause and to the question under the commerce clause. We believe that this statement enunciates a doctrine which has never hereto-

fore been announced by the Court and one which, if followed to its natural conclusion, would lead to unforeseen and wholly improper results.

We submit that it is a dangerous test to adopt to say that because the legislature of Ohio could have enacted a statute on a proper allocation basis, which would have produced even more money than was produced by the Ohio franchise taxes involved in this appeal, such taxes are therefore unobjectionable. It is practically impossible for any two people to agree upon what constitutes an undue financial burden on a large taxpayer. During World War II, we have all seen income taxes mount to hitherto unknown levels. It is not the dollar burden of the tax that should be the test, and to make the dollar burden the test is to establish a dangerous standard. A tax of $100,000 per year, based on a fair allocation formula, would be constitutional, whereas a flat tax of $20,000 a year on an arbitrary basis, bearing no relation to the business done, or on an arbitrary or "loaded" formula would be unconstitutional. In short, the test is what the state has actually done, and not what the state might have done by a fairly apportioned tax. This, we understand, is exactly the test which this Court laid down in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, and in *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460.

In *Alpha Portland Cement Co.* v. *Massachusetts*, the total tax amounted to only $800.45. The corporation's total net income per its federal return was $707,577.98, and its total tangible assets amounted to $16,992,355.22. Its total gross receipts were $10,717,546.43. It is obvious that a tax in Massachusetts of $800.45 would be neither confiscatory nor burdensome in a financial sense. But this Court said (page 218):

"It must now be regarded as settled that a State

may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."

In *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, the State of Washington levied graduated filing fees upon the authorized capital stock of foreign corporations with a maximum limit of $3,000. The Court said that the $3,000 flat maximum did not save the tax. It noted the above quoted language in the *Alpha Portland Cement Co.* case, and held the enactment void both under the Commerce Clause and the Due Process Clause. The dollar burden is not the test.

In his dissenting opinion in the *Cudahy Packing Company* case, Mr. Justice Brandeis laid stress on the fact that the taxes were not measured by the amount of interstate commerce, that they "do not grow, or shrink, according to the volume of interstate commerce or of the capital used in it," and that the statute fixed a maximum limit of $3,000. (P. 467.)

But in the case of the Ohio franchise taxes here involved, there is no maximum limit, the taxes are largely measured by transactions in interstate commerce, and they grow directly with the volume of interstate commerce and shrink when such volume shrinks. We showed in Appellant's brief that the tax for 1939 would be almost doubled by including in the numerator of the business fraction, sales

by branches outside of Ohio of Springfield trucks shipped direct from the Springfield factory to dealers in other states.

The decision in the instant case cites *Hump Hair Pin Co.* v. *Emmerson*, 258 U. S. 290, and *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, to the point that interstate sales may be included in the numerator of a franchise tax fraction. Both those cases, however, relied on the point that the increase in tax due to the inclusion of the interstate sales was negligible, that the property in Illinois might go down while the Illinois receipts went up, and vice versa, and that there was no necessary connection between the interstate receipts and the amount of the tax.

But in our case the inclusion of the interstate receipts practically doubles the tax, the increase is material, and moreover the property in Ohio could be reduced to nothing and the entire tax on the property fraction thereby wiped out, and still the total Ohio franchise tax for 1939, for example, would be increased from $15,655.00 to $21,132.00, or an increase of 35%.*

We fully appreciate, as the Court says, that no perfect apportionment of interstate business and property can be made by any formula, but nevertheless, where an apportionment results in practically doubling the tax by including business handled by out-of-state branches, it is evident that there is more involved than a mere failure to meet the test of perfect apportionment. We respectfully submit that the Ohio apportionment is so faulty that it inevitably results in taxing substantial property outside of Ohio and in placing a multiple and excessive burden on transactions in interstate commerce.

The above observations, as will be noted, apply both to

* Examples 1 and 2, Footnote, Appellant's Brief, p. 20. Property ratio 2.4654. (R. 62.)

the argument under the Due Process Clause and under the Commerce Clause. We now wish to treat very briefly the Due Process Clause and the Commerce Clause separately.

Due Process Clause.

We note that the Court said in footnote 3 on page 4 of the printed advance sheet that

> "The State contends here that it did not include in the 'business done' numerator an amount equal to the proceeds from sales by Ohio branches to Ohio customers of goods which were shipped to the Ohio customers from factories outside Ohio. Appellant insists that it did. We need not resolve this controversy, for we think the result is the same whichever view is taken."

We do not believe that this point should ever have been raised by the Appellee in his brief, nor in his oral argument before this Court, for the Stipulation of Facts signed by Thomas J. Herbert, Attorney General, and Perry L. Graham, Assistant Attorney General, agreed that there was no such controversy. Paragraph 14 of the Stipulation of Facts (R. 63) reads as follows:

> "14. In his computation, the tax commissioner has found the figure of business done in Ohio to be the amount of the sales proceeds of all goods manufactured by the company in Ohio, plus the amount of the sales proceeds received by Ohio branches from the sale of general line goods, that is, agricultural implements and machinery, tractors, stationary engines, and parts sold by the Ohio branches to Ohio dealers and users. These general line goods were all manufactured by the company outside Ohio."

We refer again to the testimony of Charles L. Johns (R. 20, lines 34-39); to R. 71, beginning in the fourth line from the bottom of the page with the words "the tax

commissioner" to the end of that sentence; also to R. 74, the last paragraph on the page; and also to R. 76, lines 3 to 7.

There is not a shred of evidence to support Appellee's contention. We have noted five references in the Record which definitely dispose of it, including the Stipulation of Facts signed by the Attorney General of Ohio.

This Court itself states on page 4 of its opinion:

> "Thus it measured the value of the Ohio sales agencies' business by the total amount of the preceding year's Ohio sales of goods manufactured outside of Ohio as well as those manufactured in Ohio. Here again appellant's contention that this resulted in taxing out-of-state or interstate transactions or sales in violation of the Due Process clause is wholly without substance. The Ohio sales agencies' business and their sales to Ohio customers were intrastate activities. *International Harvester Co.* v. *Department of Treasury, et al.*, 322 U. S. 340."

The Court then goes on to approve the inclusion by the State of Ohio in the amount of the Ohio sales agencies' business, of the total "amount of the preceding year's Ohio sales of goods manufactured outside of Ohio as well as those manufactured in Ohio." The very opinion of the Court, therefore, which states that it is not necessary to resolve the controversy, actually resolves it by approving the inclusion in Ohio business of the sales of goods manufactured outside of Ohio.

While in Appellee's brief and on the oral argument the attorney for Appellee agreed that the sales by Ohio branches to Ohio buyers of goods manufactured outside Ohio and shipped direct from the outside factory to the Ohio buyers should be eliminated, and even insisted that they had been eliminated, the fact remains that they have not been eliminated and that the decisions of the Ohio

Board of Tax Appeals, the Supreme Court of Ohio and of this Court have all approved their inclusion as Ohio business.

We respectfully point out that Appellant has never contended that the sales by the Ohio branches to Ohio customers were not intrastate activities. On Appellant's original Ohio franchise tax returns it included all sales by the Ohio branches to Ohio customers, whether the goods were manufactured in Ohio or outside Ohio, and whether they were shipped to the purchaser from an Ohio branch or direct from the factory outside Ohio to the buyer in Ohio. Appellant has never asked that the amount of sales by Ohio branches to Ohio customers of goods manufactured outside Ohio and shipped direct from the outside factories to the Ohio purchasers should be excluded.

But what Appellant did say, and now again submits, is that it is impossible to include as "Ohio business" both of the following classes of sales, without including in Ohio business one class of sales which is not Ohio business and has no situs in Ohio. These two classes of sales are the following:

(1) Sales made by Ohio branches of goods manufactured outside Ohio and shipped direct from the outside factory to the Ohio buyers.

(2) Sales by branches outside Ohio of Springfield trucks when the trucks were shipped direct from the Springfield factory to the buyers outside Ohio.

Surely, it is inconceivable that both these classes of sales could be Ohio business, when one of them is the exact opposite of the other.

Therefore, we cannot agree with the statement in the footnote on page 4 of the Court's opinion that "the result is the same whichever view is taken," namely, whether or not the sales by Ohio branches to Ohio buyers, of goods

manufactured outside Ohio and shipped direct from the outside factory to the Ohio buyers, are included in Ohio business. Financially, it certainly makes a difference because the amount of Ohio business is definitely increased by the amount of such inclusion. From the standpoint of due process, it clearly makes a difference, because we repeat that both these classes of sales cannot have a situs in Ohio.

Appellant has pressed this point throughout. It raised it in its Notice to the Board of Tax Appeals (R. 12); again in its Petition for Rehearing before that Board (R. 85); and again in its Amended Notice of Appeal to the Supreme Court of Ohio (R. 7) and before this Court.

A question was raised in Appellee's brief and in the argument before this Court as to the amount of these sales. The Record does not show the amount. The assessments involved in this appeal were first certified to the Attorney General on July 25, 1941, and certified by him to the Treasurer of the State of Ohio on July 29, 1941. From that time on, Appellant had only one course to take and that was to file an Application for Review within 30 days. This was done on August 25, 1941. (R. 8.)

It took the examination of 58,000 invoices for the year 1939 to ascertain the proportion of trucks shipped from the Springfield plant direct to buyers in other states. No one knows how many invoices appellant would have had to examine to ascertain the amount of goods shipped direct from numerous factories outside Ohio to Ohio buyers on sales by Ohio branches.

But as Appellant conceded that these sales were "Ohio business" under the decision in *International Harvester Company, et al.* v. *Department of Treasury, et al.*, 322 U. S. 340, an ascertainment of the amount would only go to show the extent of the inconsistent inclusion in Ohio

business of sales by Ohio branches to Ohio buyers of goods of outside manufacture, shipped into Ohio direct to buyers, and at the same time the inclusion in Ohio business of sales of Springfield trucks shipped direct to buyers in other states on sales by branches in those states. The amount of the former sales has no effect on the question involved. But there is sufficient in the Record to show that the amount of such sales was considerable and not negligible.

The Board of Tax Appeals found that of the Springfield trucks shipped to United States destinations, 38% went direct to dealers and users in other states, and 62% went to Appellant's branches. It would seem to be a reasonable conclusion, if 38% of the Springfield trucks on sales by branches outside of Ohio to purchasers in their states were shipped direct from the Springfield factory to those purchasers, that a substantial proportion of the goods manufactured outside of Ohio, when sold by Ohio branches to Ohio buyers, were also shipped direct from the outside factories to the Ohio buyers.

Our point, which has not been covered by this Court in its decision, is that it is impossible to say that both these classes of sales are Ohio business.

The Court in its decision states that one branch of Appellant's business in Ohio is manufacturing, and that it "has long been established that a state can tax the business of manufacturing." We conceded both in Appellant's Brief and in Appellant's Reply Brief and on the oral argument that Ohio can tax the manufacturing activity. We said, however, that the Ohio tax is no more a tax on manufacturing than was the Indiana Gross Income Tax which this Court expressly held to be not a tax on manufacturing but a general tax on gross income. *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307. The Ohio franchise tax is like-

wise not a tax on manufacturing, but a general tax on doing business, a tax which every state in which Appellant performs acts may impose. The 38% of sales of Springfield trucks shipped direct to buyers outside of Ohio, on sales by branches outside Ohio, are predominantly business in states other than Ohio, and the manufacturing activity in Ohio is only a partial and contributing factor in such business.

That manufacturing activity certainly does not escape under the Ohio franchise tax because under the property fraction tax imposed on one-half the franchise tax value, it is obvious that the manufacturing plant, machinery and equipment and inventories would weigh very heavily in the determination of the tax and fairly measure the manufacturing activity.

We respectfully submit that in its eagerness to reach the manufacturing activity, the state of Ohio has reached more than the manufacturing activity. It has reached the *selling* activity of Appellant in states other than Ohio. The sale of Springfield trucks here involved was wholly managed, operated and controlled by its branches outside Ohio. The branches outside Ohio in each case solicited the sale, accepted the order or contract of sale, directed the shipment of the truck, received the sales proceeds and collected the amounts when due. The entire difference between the manufacturing cost of a truck and the sale proceeds of that truck was due to the selling activities outside Ohio. The Springfield plant did nothing to create that value. Therefore, under the assessments as now approved, Ohio is not only reaching the manufacturing activity in Ohio, but it is reaching Appellant's selling activity outside Ohio. That selling activity, as measured by the gross proceeds of sales, is taxed in the states where the selling activity is carried on, is taxed also as business done for franchise tax

purposes, and as income earned under both net income and gross income taxes.

We have pointed out that the Ohio legislature had ample means, in addition to the property fraction, of reaching the manufacturing activity without resort to such a distorted franchise tax formula as is here involved. It could have imposed a manufacturer's excise tax. It could have made one element in the franchise tax formula the ratio of manufacturing cost in Ohio to total manufacturing cost. It could have made one element in the franchise tax formula the ratio of wages and salaries in Ohio to total wages and salaries.

But Ohio in these assessments has included in the numerator of the "business done" fraction the amount of Ohio sales plus 38% of the goods manufactured in Ohio and sold outside Ohio, whereas the denominator consists solely of total sales and nothing more.

For all these reasons, the resulting Ohio franchise tax formula as applied in this case is a distorted formula which inevitably allocates to Ohio a franchise tax value which arises and is located outside Ohio.

Commerce Clause.

Finally, we base our Petition for Rehearing on the ground that Appellant presented in this case an actual imposition of multiple taxation of the same gross receipts in interstate commerce transactions. This Court said in *International Harvester Company* v. *Department of Treasury*, 322 U. S. 340, that it would cross the bridge of double taxation when it came to it. This was a recession from the Court's position in *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, and in *Gwin, White and Prince, Inc.* v. *Henneford*, 305 U. S. 434, in which the Court said that if the tax

was of such a nature that it could be imposed in more than one state, the Court would not allow the first state to impose it. In short, in *J. D. Adams Mfg. Co.* this Court said that the very fact that the taxpayer was laid open to the possibility of multiple taxation was sufficient to cause the tax to be held invalid. In *International Harvester Company* v. *Department of Treasury, supra,* the Court said it would cross the bridge of double taxation when it came to it. We submitted in our briefs that we had come to that bridge, and yet in the decision in this case the Court says:

> "Since it has not been demonstrated that the apportionment here achieves an unfair result, *cf. Hans Rees' Sons, Inc.* v. *North Carolina,* 283 U.S. 123, 134, 135, and since it is assessed only against the privilege of doing local Ohio business of manufacturing and selling, we do not come to the question, argued by appellant, of possible multiplication of this tax by reason of its imposition by other states."

We respectfully submit that this is an entirely new requirement, never yet laid down on the question of multiple taxation. If the tax is a multiple tax, there should be no necessity of showing that each tax in itself is unfair.

We have shown above that Appellant's Ohio franchise taxes as approved in this case include in the amount of Ohio "business done" the value created not merely by the manufacturing operations in Ohio, but also by the selling activities outside Ohio. We have also shown that the assessments herein involved include gross receipts from sales of Springfield trucks made by branches outside Ohio to buyers outside Ohio, where the trucks were shipped direct to the buyers outside Ohio, and that such inclusion results in almost doubling the tax.

We have also shown that 31 states include as business of their states in their income taxes, sales of Springfield trucks when Springfield trucks are sold by branches in those states to buyers in those states. We have shown that

10 states in the computation of their franchise taxes include sales of Springfield trucks when made by branches in those states to buyers in those states.

We have further shown that in Indiana a sale of a Springfield truck by an Indiana branch to an Indiana buyer is subject to the Indiana gross income tax, and that in any other state where a gross income tax or gross receipts tax is imposed, the sale of a Springfield truck by a branch in that state to a buyer in that state would be subject to that tax. And yet the same sale of a Springfield truck is included in the measure of the Ohio franchise taxes here involved.

This clearly is the use of the same gross receipts to determine; as the case may be, an Ohio franchise tax and another state's gross income tax, or the Ohio franchise tax and another state's net income tax, or the Ohio franchise tax and another state's franchise tax. We believe that it is important that the Court pass on this question of multiple taxation.

Appellant earnestly urges that a rehearing should be granted if for no other reason than to clear up some of the doubts raised by the Court's decision in this case which, unless clarified, we believe will cause widespread misunderstanding and difficulties in the determination of franchise tax liabilities of innumerable corporate taxpayers in the many franchise tax states.

To summarize, these doubts are:

1. The doubt raised by the apparent adoption by the Court of the test of whether, under all the circumstances, the tax in question constitutes a "potentially unfair result," thus apparently applying the test of the amount in dollars, instead of the test, which we submit this Court laid down in *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, of the soundness of the formula.

2. The doubt raised by the Court's apparent adoption

of the rule that the objection of multiple taxation does not apply if the tax in question itself does not achieve an "unfair result." We submit that each one of the multiple taxes might be a fair tax in itself, and yet the multiple burden would result in each tax being unconstitutional.

3. The doubt raised by the apparent approval of the proposition that Ohio can reach after not only the manufacturing activity in Ohio, but also the selling activity in states other than Ohio which produced all the excess of the sales proceeds over and above the manufacturing cost in Ohio.

4. The doubt raised by the Court's approval of the action of Ohio in including in "Ohio business" sales of Springfield trucks sold by branches outside of Ohio to buyers outside of Ohio, where the trucks were shipped from the Springfield factory direct to the buyers outside of Ohio, and at the same time including as "Ohio business" sales by branches in Ohio to buyers in Ohio where the articles were manufactured outside of Ohio and shipped direct to the buyers in Ohio. This double inclusion necessarily results in the inclusion in "Ohio business" of business which does not have a situs in Ohio.

5. The doubt raised by the fact that the Court has not passed on the question of the multiple use of the same interstate sales receipts in arriving at the Ohio franchise taxes, and yet at the same time in arriving at another state's gross income tax, or net income tax in any one of 31 other states, or a state franchise tax in any one of 10 other states.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1946.

International Harvester Company, Appellant, v. William S. Evatt, Tax Commissioner of Ohio, Appellee.	On Appeal from the Supreme Court of the State of Ohio.

[January 6, 1947.]

Mr. Justice Black delivered the opinion of the Court.

The Supreme Court of Ohio affirmed a decision of that State's Board of Tax Appeals fixing the amount owed by appellant for its State corporation franchise tax for the years 1935 to 1940, inclusive. 146 Ohio State 58. In affirming, the Ohio court rejected appellant's contention that the controlling tax act, §§ 5495–5499 Ohio Gen. Code, as applied to appellant, was in violation of the Due Process clause of the Fourteenth Amendment and the Commerce clause of the Federal Constitution. The case is here on appeal under 28 U. S. C. § 344. Appellant repeats its arguments as to invalidity of the tax, but only as to the years 1937 to 1940, inclusive.

Section 5495 of the Ohio Gen. Code provides that each foreign corporation authorized to do business in the State must pay a tax or fee for the "privilege of doing business" or "owning or using a part or all of its capital or property" or "holding a certificate . . . authorizing it to do business in the state". It is not denied that appellant owed a franchise tax under this section for it held a certificate to do business in Ohio during all the years in question. It also owned and operated two large factories at Springfield, Ohio, which produced millions of dollars worth of goods. And it operated four branch selling establishments associated with four warehouses, and fourteen retail stores, all located at various places in Ohio, which stored and sold goods produced at the Ohio factory.

But appellant also owns and operates sixteen factories, nearly a hundred selling agencies, and numerous retail stores in other states. Goods produced at its Ohio factories are not only sold in Ohio, but in addition, are shipped for storage to out-of-Ohio warehouses to be sold by out-of-Ohio selling agencies to out-of-Ohio customers. Some are shipped directly to out-of-Ohio customers on orders from out-of-Ohio selling agencies. Conversely, goods manufactured by appellant out-of-Ohio are shipped to its Ohio warehouses, and sold by its Ohio selling agencies to Ohio customers. Appellant's claim is that the amount of the tax assessed against it has been determined in such manner that a part of it is for sales made outside Ohio and another part for interstate sales. These consequences result, appellant argues, from the formula used by Ohio in determining the amount and value of Ohio manufacturing and sales, as distinguished from interstate and out-of-state sales.

The tax is computed under the Ohio statute in the following manner: Section 5498 prescribes the formula used in determining what part of a taxpayer's total capital stock represents business and property conducted and located in Ohio.[1] To determine this, the total value of issued capital stock is divided in half. One half is then multiplied by a fraction, the numerator of which is the value of all the taxpayer's Ohio property, and the denominator of which is the total value of all its property wherever owned. The other half is multiplied by another fraction whose numerator is the total value of the "business done" in the State and whose denominator is country-wide business. Addition of these two products gives the tax base, which, when multiplied by the tax rate of 1·10 of 1%, produces the amount of the franchise tax.

[1] Section 5498 also sets out in some detail the factors to be considered, and those not to be considered, in calculating the total value of a taxpayer's issued and outstanding stock. These provisions are not here at issue.

In the "business done" numerator the State included as a part of Ohio business an amount equal to the sales proceeds of a large part of the goods manufactured at appellant's Ohio plants, no matter where the goods had been sold or delivered.[2] A part of the measure of the tax is consequently an amount equal to the sales price of Ohio-manufactured goods sold and delivered to customers in other states. Appellant contends that the State has thus taxed sales made outside of Ohio in violation of the Due Process clause. A complete answer to this due process contention is that Ohio did not tax these sales. Its statute imposed the franchise tax for the privilege of doing business in Ohio for profit. The State supreme court construed the statute as imposing the tax on corporations for engaging in business such as that in which taxpayer engaged. One branch of that business was manufacturing. It has long been established that a state can tax the business of manufacturing. The fact that it chose to measure the amount of such a tax by the value of the goods the factory has produced, whether of the current or a past year, does not transform the tax on manufacturers to something else. *American Mfg. Co. v. St. Louis*, 250 U. S. 459; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 288–289; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 189–190; *Wallace* v. *Hines*, 253 U. S. 66, 69. *Freeman* v. *Hewitt*, slip opinion No. 3, October Term, 1946, p. 6. See also *Adams* v. *Storen*, 304 U. S. 307, 313–314, and cases cited in notes 14 and 15.

In the Ohio "business done" numerator, we assume the State also included sales made by Ohio branches to Ohio customers of goods manufactured and delivered to these

[2] Rule 275, Tax Commissioner of Ohio, Oct. 13, 1939, exempted from the computation all goods manufactured by appellant in Ohio, but shipped to appellant's out-of-Ohio warehouses before sale.

Ohio customers from out-of-Ohio factories.[2] Appellant's business practice was to conduct and account for its sales agencies' activities separately and distinctly from its factory operations. The State followed this distinction. It treated the sales agencies as conducting one type of business and the factories another. Thus it measured the value of the Ohio sales agencies' business by the total amount of the preceding year's Ohio sales of goods manufactured outside of Ohio as well as those manufactured in Ohio. Here again, appellant's contention that this resulted in taxing out-of-state or interstate transactions or sales in violation of the Due Process clause is wholly without substance. The Ohio sales agencies' business and their sales to Ohio customers were intrastate activities. *International Harvester Co.* v. *Department of Treasury et al.*, 322 U. S. 340. What effect inclusion of this element in the "business done" numerator would have were these transactions not intrastate is a question we need not now decide.

What we have said disposes of the only grounds urged to support the due process contention. It also answers most of the argument made against the Ohio statute on the ground that its application to appellant unduly burdens interstate commerce and therefore violates the Commerce clause. Of course, the commerce clause does not bar a state from imposing a tax based on the value of the privilege to do an intrastate business merely because it also does an interstate business. *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 336. Nor does the fact that a computation such as that under Ohio's law includes receipts from interstate sales affect the validity of a fair apportion-

[2] The State contends here that it did not include in the "business-done" numerator an amount equal to the proceeds from sales by Ohio branches to Ohio customers of goods which were shipped to the Ohio customers from factories outside Ohio. Appellant insists that it did. We need not resolve this controversy, for we think the result is the same whichever view is taken.

ment. See *e. g., Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113; *American Mfg. Co.* v. *St. Louis, supra*; *International Shoe Co.* v. *Shartel*, 279 U. S. 429, 433; *Western Cartridge Co.* v. *Emmerson* 281 U. S. 511. And here, it clearly appears from the background of Ohio's tax legislation that the whole purpose of the State formula was to arrive, without undue complication, at a fair conclusion as to what was the value of the intrastate business for which its franchise was granted. In October, 1924, this Court struck down Ohio's then corporation franchise tax on the ground that it did not make an opportionment between local and interstate business so as to confine its tax to local business only. The tax was also held to be in violation of the Equal Protection clause. *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71. In April 1925, the legislature of Ohio passed a new act expressly to cure the defects this Court had found in the old law.[4] 111 Ohio Laws 471. That 1925 Act, as slightly amended,[5] is the law under which the present apportionment was made.

Plainly Ohio sought to tax only what she was entitled to tax, and there is nothing about application of the formula in this case that indicates a potentially unfair result under any circumstances. It is not even contended here that the amount of these taxes could be considered to bear an unjust or improper relation to the value of the privilege of doing business in Ohio if the legislature had imposed a flat fran-

[4] In vetoing the bill which became the law, on grounds not here relevant, the Governor of Ohio said: "The Supreme Court decision, of course made it necessary for you to devise a basis for the levy of the tax other than on the authorized capital stock. You have seen fit to embody in the pending measure an asset value or total net worth basis for the assessment of the tax on domestic corporations as well." Ohio House Journal 1925, Vol. III, 874. The bill was passed over his veto.

[5] 112 Ohio Laws 410 (1929); 113 Ohio Laws 637 (1929); 114 Ohio Laws 714 (1931); 115 Ohio Laws 589 (1933)

chise tax of the same amounts for the respective years which application of this formula has produced. See *Hump Hairpin Co.* v. *Emmerson*, *supra* at 296. Furthermore, this Court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities such as those of appellant, and has declared that "rough approximation rather than precision" is sufficient. *Illinois Central Ry.* v. *Minnesota*, 309 U. S. 157, 161. Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments. See cases collected in opinion of Mr. Chief Justice Stone, dissenting, *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 325. A state's tax law is not to be nullified merely because the result is achieved through a formula which includes consideration of interstate and out-of-state transactions in their relation to the intrastate privilege. Since it has not been demonstrated that the apportionment here achieves an unfair result, *cf. Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123, 134, 135, and since it is assessed only against the privilege of doing local Ohio business of manufacturing and selling, we do not come to the question, argued by appellant, of possible multiplication of this tax by reason of its imposition by other states. None of them can tax the privilege of operating factories and sales agencies in Ohio.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1946.

International Harvester Company, Appellant, v. William S. Evatt, Tax Commissioner of Ohio.	Appeal from the Supreme Court of the State of Ohio.

[January 6, 1947.]

Mr. Justice Rutledge, concurring.

I concur in the opinion and judgment of the Court. But I desire to add that, in the due process phase of the case, I find no basis for conclusion that any of the transactions included in the measure of the tax was so lacking in substantial fact connections with Ohio as to preclude the state's use of them, cf. *McLeod* v. *Dilworth Co.*, 322 U. S. 327, dissenting opinion at 352-357, if indeed a limitation of this sort were material to an apportionment found on the whole to be fairly made. For the rest, as the Court holds, the apportionment clearly is valid.